

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ADAM BROOKS,

Plaintiff,

vs.

CITY OF HENDERSON, *et al.*,

Defendants.

Case No.: 2:14-cv-00374-GMN-GWF

ORDER

Pending before the Court is the Motion for Summary Judgment, (ECF No. 39), filed by Defendant Joseph W. Ebert (“Defendant”). Plaintiff Adam Brooks (“Plaintiff”) filed a Response, (ECF No. 45), and Defendant filed a Reply, (ECF No. 46). For the reasons discussed below, the Court GRANTS Defendant’s Motion for Summary Judgment.

I. BACKGROUND

This case arises from Plaintiff’s arrest for the impersonation of a police officer in violation of NRS § 199.430. Defendant, a police officer with the Henderson Police Department (“HPD”), was assigned to investigate Plaintiff, a former HPD officer and a licensed bail enforcement agent, following two events that suggested possible violations of NRS § 199.430. (Ex. A to Mot. for Summary J. (“MSJ”), ECF No. 39-1); (Ex. 2 to Resp. at 6, ECF No. 45-2); (Ex. 3 to Resp., ECF No. 45-3).

The first incident, a traffic stop in which Plaintiff was stopped for speeding, occurred on March 11, 2012. (*See* Ex. A-2 to MSJ at 16, ECF No. 39-3). The incident report prepared by the HPD officer involved, Officer Jonathan Bezrutczyk (“Officer Bezrutczyk”), states that Plaintiff “introduced himself as a retired officer” and “presented an active duty Henderson Police Department flat badge.” (*Id.*). Based on the length of Plaintiff’s service as a police

1 officer with the HPD, Officer Bezrutczyk concluded that Plaintiff “unlawfully retained his flat
2 badge.” (*Id.* at 17–18). Another HPD officer later impounded the badge. (*Id.* at 18).

3 The second incident occurred on October 11, 2011, at a McDonald’s restaurant located
4 in Henderson, Nevada. (*See* Ex. A-1 to MSJ (“Aff. for Warrant”), ECF No. 39-2). Although
5 this event took place before the traffic stop, HPD only later became aware of the McDonald’s
6 incident because Dave Erickson (“Erickson”), a Senior Investigator for the State of Nevada,
7 Department of Business and Industry, Division of Insurance (“Insurance Division”), reported
8 the incident to HPD on April 3, 2012. (*Id.* at 2). Erickson investigated the incident pursuant to
9 the Insurance Division’s regulatory and enforcement authority relating to Plaintiff’s bail
10 enforcement license. (*See id.*).

11 During his investigation, Erickson interviewed the McDonald’s employees who
12 witnessed the incident and compiled audio recordings of his interviews. (*Id.* at 2–3). The
13 employees’ accounts of the event generally agree that on the day of the incident, several bail
14 agents visited the McDonald’s location demanding information about an employee’s boyfriend,
15 whom the agents stated was wanted for arrest. (*Id.* at 3–5). While at the restaurant, one of the
16 bail agents spoke on the phone with the McDonald’s area manager, Fortunato Balanzar
17 (“Balanzar”). (*Id.* at 3). According to Balanzar, the bail agent identified himself as a “police
18 officer.” (*Id.*). Another employee who spoke with the bail agent on the phone “stated that the
19 bail agent never said he was a ‘police officer’” but “did make statements that he was an
20 ‘officer’ cooperating with the police.” (*Id.* at 3). No witnesses physically present for the
21 incident stated that the bail agent identified himself as a police officer. (*Id.* at 4).

22 Defendant reviewed the interviews conducted by Erickson and concluded that, based on
23 video surveillance footage of the incident, the agent who spoke with Balanzar was Plaintiff.
24 (*Id.*). On May 1, 2012, Defendant conducted his own interview of Balanzar, who confirmed his
25 prior statement of events. (*Id.*). Based on his investigation, Defendant prepared an Affidavit for

Warrant referencing both incidents and asserting that probable cause existed to arrest Plaintiff for violation of NRS § 199.430. (*Id.* at 5). On June 6, 2012, a Warrant of Arrest issued and a Criminal Complaint charging Plaintiff for impersonating a police officer was filed. (Ex. A-3 to MSJ, ECF No. 39-4); (Ex. B to MSJ, ECF No. 39-5). The charges against Plaintiff were ultimately dismissed pursuant to a plea agreement. (Ex. B to MSJ at 6).

Plaintiff filed his original Complaint on March 12, 2014, alleging: (1) violation of civil rights pursuant to 42 U.S.C. § 1983; (2) municipal liability pursuant to *Monell*; (3) supervisory liability pursuant to 42 U.S.C. § 1983; (4) state law malicious prosecution; and (5) state law false arrest. (Compl. ¶¶ 26–64, ECF No. 1). Plaintiff subsequently filed his Amended Complaint on June 11, 2014. (*See* Am. Compl., ECF No. 8). The instant Motion seeks summary judgment on the basis of qualified immunity regarding Plaintiff’s only surviving claim, § 1983 liability against Defendant for submitting the Affidavit for Warrant in violation of Plaintiff’s Fourth Amendment rights. (*See* MSJ at 39).

II. LEGAL STANDARD

A. Motion for Summary Judgment

The Federal Rules of Civil Procedure provide for summary adjudication when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Material facts are those that may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *See id.* “Summary judgment is inappropriate if reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict in the nonmoving party’s favor.” *Diaz v. Eagle Produce Ltd. P’ship*, 521 F.3d 1201, 1207 (9th Cir. 2008) (citing *United States v. Shumway*, 199 F.3d 1093, 1103–04 (9th Cir. 1999)). A

1 principal purpose of summary judgment is “to isolate and dispose of factually unsupported
2 claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

3 In determining summary judgment, a court applies a burden-shifting analysis. “When
4 the party moving for summary judgment would bear the burden of proof at trial, it must come
5 forward with evidence which would entitle it to a directed verdict if the evidence went
6 uncontroverted at trial. In such a case, the moving party has the initial burden of establishing
7 the absence of a genuine issue of fact on each issue material to its case.” *C.A.R. Transp.*
8 *Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In
9 contrast, when the nonmoving party bears the burden of proving the claim or defense, the
10 moving party can meet its burden in two ways: (1) by presenting evidence to negate an
11 essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving
12 party failed to make a showing sufficient to establish an element essential to that party’s case
13 on which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–
14 24. If the moving party fails to meet its initial burden, summary judgment must be denied and
15 the court need not consider the nonmoving party’s evidence. *See Adickes v. S.H. Kress & Co.*,
16 398 U.S. 144, 159–60 (1970).

17 If the moving party satisfies its initial burden, the burden then shifts to the opposing
18 party to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v.*
19 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute,
20 the opposing party need not establish a material issue of fact conclusively in its favor. It is
21 sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the
22 parties’ differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*
23 *Ass’n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid
24 summary judgment by relying solely on conclusory allegations that are unsupported by factual
25 data. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go

1 beyond the assertions and allegations of the pleadings and set forth specific facts by producing
2 competent evidence that shows a genuine issue for trial. *See Celotex Corp.*, 477 U.S. at 324.

3 At summary judgment, a court's function is not to weigh the evidence and determine the
4 truth but to determine whether there is a genuine issue for trial. *See Anderson*, 477 U.S. at 249.
5 The evidence of the nonmovant is "to be believed, and all justifiable inferences are to be drawn
6 in his favor." *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is
7 not significantly probative, summary judgment may be granted. *See id.* at 249–50.

8 **B. Qualified Immunity**

9 Qualified immunity protects defendants "from suit" and is not "a mere defense to
10 liability." *Pearson v. Callahan*, 555 U.S. 223, 237 (2009). The qualified immunity test is a
11 two-pronged inquiry in which courts must consider whether the facts alleged "make out a
12 violation of a constitutional right" and whether "the right at issue was 'clearly established' at
13 the time of defendant's alleged misconduct." *Pearson*, 555 U.S. at 816 (quoting *Saucier v.*
14 *Katz*, 533 U.S. 194, 201 (2001)). The "relevant, dispositive inquiry is whether it would be clear
15 to a reasonable officer that the conduct was unlawful in the situation he confronted." *Saucier*,
16 533 U.S. at 194–95; *see also Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("The contours
17 of the right must be sufficiently clear that a reasonable official would understand that what he is
18 doing violates that right."). A court may consider the two prongs of the qualified immunity
19 inquiry in any order it pleases. *Pearson*, 555 U.S. at 234, 239.

20 Under the first prong, courts consider whether the alleged facts, taken in the light most
21 favorable to plaintiff, show that defendants' conduct violated a constitutional right. *Saucier*,
22 533 U.S. at 201. In resolving this first inquiry, the court determines whether the alleged facts,
23 taken in the light most favorable to the plaintiff, show that defendants were reasonable in their
24 belief that their conduct did not violate the Constitution. *Wilkins v. City of Oakland*, 350 F.3d
25 949, 955 (9th Cir. 2003). In other words, even if the defendants' actions did violate the Fourth

1 Amendment, a “reasonable but mistaken belief that [their] conduct was lawful would result in
 2 the grant of qualified immunity.” *Id.* Qualified immunity thus “provides ample protection to all
 3 but the plainly incompetent or those who knowingly violate the law.” *Id.* (quoting *Malley v.*
 4 *Briggs*, 475 U.S. 335, 341 (1986)).

5 Under the second prong, the court determines “whether the right was clearly
 6 established” and applies an “objective but fact-specific inquiry.” *Inouye v. Kemna*, 504 F.3d
 7 705, 712 (9th Cir. 2007); *see Saucier*, 533 U.S. at 202. It is not enough that the general rule is
 8 established. *Id.* The critical question is whether “the contours of the right were sufficiently
 9 clear that a reasonable official would understand that what he is doing violates the right.”
 10 *Saucier*, 533 U.S. at 202. “The relevant dispositive inquiry in determining whether a right is
 11 clearly established is whether it would be clear to a reasonable officer that his conduct was
 12 unlawful in the situation he confronted.” *Id.* The court’s “task is to determine whether the
 13 preexisting law provided the defendants with fair warning that their conduct was unlawful.”
 14 *Elliot–Park v. Manglona*, 592 F.3d 1003, 1008 (9th Cir. 2010).

15 **III. DISCUSSION**

16 Plaintiff claims his arrest violated the Fourth Amendment because he was arrested
 17 without probable cause. (Resp. 8:8–12, ECF No. 45). Specifically, Plaintiff argues that there
 18 was insufficient probable cause to support the issuance of the arrest warrant because Defendant
 19 deliberately included materially false statements in the Affidavit for Warrant and omitted other
 20 exculpatory evidence and information. (*Id.* 10:5–20). “The Fourth Amendment requires that
 21 arrest warrants ‘be based upon probable cause, supported by Oath or affirmation.’ *Katrina v.*
 22 *Fletcher*, 522 U.S. 118, 129 (1997) (quoting *Gerstein v. Pugh*, 420 U.S. 103, 117 (1975)).
 23 Probable cause exists where the “facts and circumstances [are] sufficient to warrant a prudent
 24 man in believing that the [suspect] had committed or was committing and offense.” *Gerstein*,
 25 420 U.S. at 111. Where an arrest is made pursuant to a warrant, the arrest violates the Fourth

1 Amendment if “a reasonably well-trained officer in [a defendant’s] position would have known
2 that his affidavit failed to establish probable cause and that he should not have applied for the
3 warrant.” *Malley*, 475 U.S. at 345.

4 Where, as here, a plaintiff claims that an arrest warrant was procured through deception,
5 “the plaintiff must (1) establish that the warrant affidavit contained misrepresentations or
6 omissions material to the finding of probable cause, and (2) make a ‘substantial showing’ that
7 the misrepresentations or omissions were made intentionally or with reckless disregard for the
8 truth.” *Bravo v. City of Santa Maria*, 665 F.3d 1076, 1083 (9th Cir. 2011). Whether a false or
9 omitted statement was “material” to the finding of probable cause is a question of law. *KRL v.*
10 *Moore*, 384 F.3d 1105, 1117 (9th Cir. 2004). To determine the materiality of omitted facts, a
11 court must first consider “whether the affidavit, once corrected and supplemented, establishes
12 probable cause.” *Bravo*, 665 F.3d at 1084. “Whether the alleged judicial deception was
13 brought about by material false statements or omissions is of no consequence.” *Liston v. City of*
14 *Riverside*, 120 F.3d 965, 973 (9th Cir. 1997). “If probable cause remains after amendment,
15 then no constitutional error has occurred.” *Bravo*, 665 F.3d at 1084.

16 Plaintiff asserts that the arrest warrant includes the following falsehoods: (1) the warrant
17 suggests that Plaintiff was not in lawful possession of the police badge, but Plaintiff asserts that
18 “as a retired police officer, [he] was lawfully in possession of the subject badge”; (2) the
19 warrant states that HPD did not authorize the badge, but Plaintiff contends that HPD had
20 authorized the badge; and (3) the warrant states that the badge was taken from Plaintiff at the
21 traffic stop, but according to Plaintiff, “[i]n actuality the badge was taken from [Plaintiff]
22 approximately fifteen minutes later while [Plaintiff] was eating at a restaurant, by threats of
23 force..[sic]” (Resp. 12:13–15). Plaintiff does not argue that the warrant included any false
24 information regarding the McDonald’s incident, and the Court finds that a “corrected” Affidavit
25 for Warrant based solely on that event would support probable cause to arrest Plaintiff for

1 violating NRS § 199.430.¹ *See Smith v. Almada*, 640 F.3d 931, 937–38 (9th Cir. 2011) (“[E]ven
 2 if [the officer] falsified and omitted this information (as [the plaintiff] contends), the corrected
 3 report and warrant application would still have contained facts sufficient to establish probable
 4 cause to arrest [the plaintiff].”).

5 Under NRS § 199.430, it is a gross misdemeanor to

6 falsely personate a public officer, civil or military, or a police
 7 officer, or a private individual having special authority by law to
 8 perform an act affecting the rights or interests of another, or who,
 9 without authority shall assume any uniform or badge by which such
 an officer or person is lawfully distinguished, and in such assumed
 character shall do any act purporting to be official.

10 NRS § 199.430. The Affidavit for Warrant prepared by Defendant states that during his
 11 investigation of the McDonald’s incident, Defendant: reviewed a surveillance video of the
 12 incident; listened to interviews of the McDonald’s employees and witnesses; and interviewed
 13 Balanar on May 1, 2012. (*See Aff. for Warrant* 3–4). Further, the Affidavit for Warrant states
 14 that Balanar confirmed during both interviews that “the bail agent specifically told him [on the
 15 phone] that he was a Henderson Police Officer and threatened to tell his sergeant if Balanar
 16 did not give him the information he was asking for.” (*Id.* at 4). Finally, Defendant avers that
 17 the surveillance video confirmed that “the only person [Balanar] could have spoke [sic] with
 18 other than [a McDonald’s employee] would have been [Plaintiff].” (*Id.*). Based on his
 19 investigation, Defendant concluded that “there is probable cause that [Plaintiff] did violate
 20 N.R.S. 199.430 Impersonate a Police Officer.” (*Id.* at 5).

21 The Court agrees that “under the totality of the circumstances known to [Defendant], a
 22 prudent person would have concluded that there was a fair probability that [Plaintiff] had
 23 committed . . . a crime”—namely, that Plaintiff falsely claimed to be a police officer during his
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25 ¹ Plaintiff points out that none of the witnesses physically present at the McDonald’s incident claimed that
 Plaintiff represented himself as a police officer. (Resp. 8:4–8). However, this fact does not qualify as a material
 falsehood or omission because the Affidavit for Warrant contains this information. (*See Aff. for Warrant* at 4).

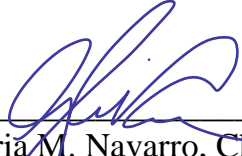
1 interaction with Balanzar. *United States v. Noster*, 590 F.3d 624, 629–30 (9th Cir. 2009); *see*
2 *also* NRS § 199.430. The Court therefore finds no genuine issue of material fact as to the
3 issues that underlie Plaintiff’s false arrest claim. *See Lombardi v. City of El Cajon*, 117 F.3d
4 1117, 1126 (9th Cir. 1997) (“[W]hen it is not plain that a neutral magistrate would not have
5 issued the warrant, the shield of qualified immunity should not be lost.”). Consequently,
6 Defendant is entitled to qualified immunity, and the Court GRANTS summary judgment in his
7 favor.

8 **IV. CONCLUSION**

9 **IT IS HEREBY ORDERED** that Defendant’s Motion for Summary Judgment, (ECF
10 No. 39), is **GRANTED**.

11 The Clerk shall close the case and enter judgment accordingly.

12 **DATED** this 28 day of March, 2017.

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18 Gloria M. Navarro, Chief Judge
19 United States District Judge
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